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No. 06-11543

IN THE

Supreme Court of the United States

LARRY BEGAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?

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INTEREST OF *AMICUS CURIAE*

The National Association of Federal Defenders ("NAFD")[1] is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of the Federal Defender Offices from across the country. The NAFD was formed in 1995 to enhance the representation provided under the Criminal Justice Act and the Sixth Amendment of the United States Constitution. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented.

Pursuant to the Criminal Justice Act, attorneys in the NAFD have been appointed by the federal courts to represent numerous indigent defendants. The NAFD thus has a strong interest in ensuring that these defendants do not have their statutory minimum or maximum sentences raised unconstitutionally. As the institutional defenders for indigent defendants, the NAFD has extensive experience with the statutory and constitutional issues involved in interpreting 18 U.S.C. § 924(e)(2)(B)(ii). The NAFD is particularly well positioned to anticipate on a practical level how differing interpretations of this statute will affect indigent defendants.

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[1] Pursuant to Rule 37.6, counsel for the NAFD states that no counsel for a party authored this brief in whole or in part and that no person, other than the NAFD, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

The Tenth Circuit's "all crimes" interpretation of the Armed Career Criminal Act's ("ACCA") "otherwise" clause in 18 U.S.C. § 924(e)(2)(B)(ii) is completely standardless.[2] It neither ties the language of the "otherwise" clause to the statutory language that precedes it, nor otherwise cabins its reach through accepted methods of statutory construction. By adopting this standardless approach, the "all crimes" interpretation allows, if not requires, judges to rely on conjecture and personal belief regarding the degree of risk posed by entire categories of criminal offenses.

The broad and conflicting case law resulting from this approach makes clear that the "all crimes" interpretation forces courts to make unguided policy decisions. The breadth of the approach is reflected by the breathtaking range of unenumerated offenses that the lower courts have deemed to be "violent felonies," including failure to report to county jail and unarmed theft of a bicycle. Moreover, circuit splits have emerged over which crimes fall within the "otherwise" clause's ambit, sowing further confusion. Accordingly, the Tenth Circuit's standardless interpretation implicates at least three serious constitutional questions: the void-for-vagueness doctrine, the trial rights guaranteed by the Fifth and Sixth Amendments, and the separation-of-powers doctrine.[3]

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[2] The "otherwise" clause specifically encompasses the following language in 18 U.S.C. § 924(e)(2)(B)(ii): "otherwise involves conduct that presents a serious potential risk of physical injury to another."

[3] NAFD also agrees with *amicus curiae* Brief of Families Against Mandatory Minimums that the rule of lenity applies.

First, the Tenth Circuit's interpretation implicates the void-for-vagueness doctrine because nothing in the language or structure of the "otherwise" clause, standing alone, provides guidance sufficient to put an ordinary person on notice that felony driving while intoxicated ("DWI") is a violent felony that triggers the ACCA's severe penalty. Indeed, the notice problem is exacerbated in Petitioner's case because New Mexico law is clear that felony DWI is not a "felony" for purposes of the State's habitual offender statute. The Tenth Circuit's interpretation also authorizes and encourages arbitrary enforcement because it lacks standards. Judges are required to make speculative decisions about the potential risk of various offenses based on guesswork and their own prejudices and beliefs.

Second, the "all crimes" interpretation threatens the trial rights guaranteed by the Fifth and Sixth Amendments. In *Apprendi* v. *New Jersey*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490 (2000). Here, the court below went beyond merely taking judicial notice of the fact of Petitioner's prior felony DWI convictions. It independently found that the conduct involved in that category of offense "presents a serious potential risk of physical injury to another," a fact that is neither in the statutory definition of the elements of the offense, nor in the case law interpreting felony DWI in New Mexico. As Justice Thomas has observed, allowing a judge to resolve contested questions as to whether a particular prior conviction

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See Brief of Families Against Mandatory Minimums as *Amicus Curiae* in Support of Petitioner.

was, in fact, a violent felony does more than merely raise constitutional questions—the exercise of such power violates a defendant's rights to notice, trial by jury, and proof beyond a reasonable doubt. *Shepard* v. *United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring); see also *James* v. *United States*, 127 S. Ct. 1586, 1610 (2007) (Thomas, J., dissenting).

Third, the "all crimes" interpretation violates the separation-of-powers doctrine. It requires courts to perform the essentially legislative function of defining the circumstances that set the range of permissible penalties, rather than performing the proper judicial function of interpreting and applying law enacted by Congress. The "all crimes" interpretation requires courts to go beyond traditional boundaries of statutory construction and declare whole categories of crimes within the ambit of the statute. Through the guise of statutory interpretation, the "all crimes" approach arrogates to the courts the legislative function of establishing minimum and maximum penalties for subsequent violations, and retroactively for prior violations, of the felon-in-possession statute. Even assuming that the Constitution permitted Congress to delegate to the courts the power to define which crimes invoke the ACCA's penalties, doing so under the excessively broad "all crimes" interpretation would be a delegation bereft of any intelligible principle to guide the courts' discretion.

The Court can avoid the "grave and doubtful" constitutional problems, *Jones* v. *United States*, 526 U.S. 227, 239 (1999), raised by the "all crimes" interpretation by adopting either Petitioner's "similar crimes" approach or an elements-based approach that would require predicate crimes to have as an element conduct that creates a "serious potential risk of

physical injury to another." Petitioner's "similar crimes" approach provides a coherent and predictable way for courts to implement the statute, and so does not implicate the void-for-vagueness doctrine. By requiring judges to determine whether the prior offense is similar to the ACCA's enumerated offenses, this approach conforms to traditional statutory construction. It also avoids the Fifth and Sixth Amendment concerns raised by the "all crimes" interpretation, because judges need not find facts to determine whether the offenses are similar in the relevant respects. Because the "similar crimes" approach constitutes nothing more than traditional statutory interpretation, it does not require courts to engage in sweeping legislative determinations regarding which crimes present the requisite degree of risk of injury.

Alternatively, an elements-based interpretation accords with the Court's "categorical" approach in *Taylor* and *Shepard*. It turns only on whether the prior conviction had as an explicit element conduct that presented a "serious potential risk of physical injury to another," putting defendants clearly on notice as to what conduct is covered by the "otherwise" clause. It also resolves potential Fifth and Sixth Amendment concerns because judges rely only on the fact of a prior conviction and the elements charged and proved beyond a reasonable doubt to a jury or admitted in a plea. By removing judicial discretion, this interpretation eliminates all doubt that judges are legislating. Instead, judges' decisions are governed by the legislatively enacted elements of statutes. Finally, this interpretation would not render superfluous the "use of force" provision in § 924(e) because the "otherwise" clause would apply

to a number of reckless endangerment crimes to which the "use of force" provision would not apply.

ARGUMENT

I. THE "ALL CRIMES" INTERPRETATION RAISES GRAVE AND DOUBTFUL CONSTITUTIONAL QUESTIONS.

A. Standardless.

The "all crimes" interpretation of the ACCA's "otherwise" clause is standardless because it divorces that clause from the preceding enumerated offenses and fails to engage in standard statutory interpretation to cabin the clause's broad reach. Because it lacks standards, this interpretation allows, if not requires, judges to apply their own conjectures and prejudices regarding degrees of risk posed by entire categories of offenses in making law under the ACCA.

The Tenth Circuit makes no attempt to assess the quantum of risk necessary to pose a "serious potential risk of physical injury" under the ACCA. Similarly, no means is provided to determine whether a crime poses such a risk. Neither does the opinion offer a means of comparing the relative risks of unenumerated crimes to the crimes that are enumerated in the statute. For these reasons, the majority opinion offers no guidance whatsoever for courts to categorize coherently some risks of physical injury as "serious potential" ones, while excluding other risks of physical injury. This reading potentially sweeps in all crimes that pose any risk that might be imagined, depending upon the unguided, subjective speculation of the court.

That the "all crimes" interpretation is completely standardless and thus forces courts to engage in

unguided policymaking is made abundantly clear by the breathtaking range of unenumerated offenses that the lower courts have "interpreted" to be "violent felonies" subject to the ACCA's dramatically enhanced penalty range. This broad range includes: (1) failure to report to county jail, *United States v. Golden*, 466 F.3d 612 (7th Cir. 2007), *petition for cert. filed*, No. 06-10751 (U.S. Apr. 9, 2007), (2) failure to stop in response to a police car's blue flashing light, *United States* v. *James*, 337 F.3d 387 (4th Cir. 2003), (3) possession of a sap, an item similar to a blackjack, *United States* v. *Canon*, 993 F.2d 1439 (9th Cir. 1993), (4) unarmed theft of a bicycle, *United States* v. *Howze*, 343 F.3d 919 (7th Cir. 2003), (5) operating a jeep without the owner's consent, *United States* v. *Jones*, 224 F. App'x 548 (8th Cir. 2007), *petition for cert. filed*, No. 07-6252 (U.S. Aug. 28, 2007), and (6) pick-pocketing, *United States* v. *Mobley*, 40 F.3d 688 (4th Cir. 1994). All of these crimes are far afield of what this Court in *Taylor* v. *United States* recognized as the purpose of the ACCA's statutory sentencing enhancement: the need to punish most severely that category of violent, recidivist offenders who were disproportionately responsible for violent crimes in the nation. See 495 U.S. 575, 584-87 (1990).

The ultimately *ad hoc* nature of the standardless "all crimes" interpretation is further evidenced by the divisions among the courts of appeals on whether certain crimes fall within the "otherwise" clause. For example, courts are split on whether failure-to-report escapes fall within the "otherwise" clause.[4] Courts

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[4] *Compare, e.g.*, *United States* v. *Chambers*, 473 F.3d 724, 726 (7th Cir. 2007), *petition for cert. filed*, No. 06-11206 (U.S. May 8, 2007); *United States* v. *Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007), *petition for cert. filed*, No. 07-61 (U.S. July 12, 2007); *United States* v. *Ruiz*, 180 F.3d 675, 676-77

are similarly divided on whether the state crime of retaliation for a public official's past action falls within the "otherwise" clause. Compare *United States* v. *Sawyers*, 409 F.3d 732 (6th Cir.), *cert. denied*, 546 U.S. 950 (2005), with *United States* v. *Montgomery*, 402 F.3d 482 (5th Cir. 2005).

It is hardly surprising that an essentially standardless test has produced divergent views among the lower courts. And a decision by this Court applying such a standardless test to *this* particular offense (felony DWI) would do little to guide lower courts to consistent results with respect to *other* unenumerated felonies. *Amicus* submits that this Court should not only resolve this case, but in the process articulate a standard that respects Congress's intent and provides guidance sufficient to lower courts to produce consistent results. See *infra*, at 25-30 (providing two alternative interpretations).

Not only is the "all crimes" approach undesirable because of its unpredictable application across different unenumerated crimes, it is also constitutionally suspect for a variety of reasons. This infinitely malleable standard that provides no guidance and thus forces judges to make fact findings based on speculation and their own policy judgments—fact findings that in turn increase the

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(5th Cir. 1999); *United States* v. *Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1249 (2007); *United States* v. *Rivera*, 127 F. App'x 543, 545 (2d Cir. 2005); *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States* v. *Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam), *and United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001), *with United States* v. *Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006), *and United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003).

prescribed penalty range for violators of 18 U.S.C. § 922(g) from a range of zero to ten years, to a range of fifteen years to life—implicates at least three "grave and doubtful" constitutional questions, *Jones*, 526 U.S. at 239: the void-for-vagueness doctrine, the Fifth and Sixth Amendments, and the separation-of-powers doctrine. We discuss each in turn below.

B. Void For Vagueness.

The "all crimes" interpretation fails to put ordinary persons on notice that felony DWI is a violent felony under the ACCA. Justice Scalia identified this potential defect in the statute last term in *James*. See 127 S. Ct. at 1601-02 (Scalia, J., dissenting). The *James* Court decided that attempted burglary was a violent felony under the ACCA because it posed a risk of physical injury similar to the risk posed by burglary—an offense Congress enumerated in the ACCA. See *id.* at 1597. Justice Scalia recognized that, when faced with an offense that had no analog among the enumerated offenses, as in this case, serious constitutional issues would arise under the void-for-vagueness doctrine. See *id.* at 1601-02 (Scalia, J., dissenting).

In Justice Scalia's view, the absence of a standard for determining whether the ACCA applies to an offense that is neither included as an enumerated offense, nor has an analog among them, would leave a substantial gap in the interpretation of the ACCA, both ill serving courts and counsel, and depriving potential offenders of notice as to what conduct would subject them to the ACCA. See *id.* ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined."). The majority

agreed that guidance was a "worthy objective,"[5] but did not reach the question because the Court was only presented with an offense that had a clear analog among the enumerated offenses. *Id.* at 1598.

Unlike this Court in *James*, the Tenth Circuit was presented with an unenumerated offense that did not have a clear analog among the enumerated offenses. By failing to provide a concrete standard that would provide notice to potential offenders, the Tenth Circuit's interpretation implicates constitutional vagueness concerns. See *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *Smith* v. *Goguen*, 415 U.S. 566, 574 (1974) ("Due process requires that all be informed as to what the State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law.") (internal quotation marks and citations omitted).

The Tenth Circuit's holding that felony DWI is a "violent felony" pursuant to its "all crimes" interpretation was particularly unforeseeable because New Mexico law explicitly disclaims

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[5] In *James*, this Court in *dicta* touched briefly on the notice problem presented by the "otherwise" clause, noting that the clause did not prevent an ordinary person from understanding what conduct it prohibits because "[s]imilar formulations have been used in other federal and state criminal statutes." 127 S. Ct. at 1598 n.6. However, in each statute the Court cited, the similar language constitutes an *element* of the crime, and therefore places defendants on notice. Nor was a void for vagueness challenge even presented to the *James* Court. *Id.*

inclusion of felony DWI in the State's habitual offender sentencing statute. In *State* v. *Begay*,[6] the New Mexico Supreme Court expressly held that felony DWI is not a "prior felony . . . conviction" for purposes of the State's habitual offender sentencing enhancement statute, N.M.S.A. § 31-18-17 (1978). 17 P.3d 434, 435-36 (N.M. 2001). The New Mexico Supreme Court reasoned that because the State's habitual offender statute did not expressly include felony DWI and the legislative history was silent, the rule of lenity required interpretation in favor of the defendant. *Id.* Two years later, in 2003, the New Mexico legislature codified the New Mexico high court's decision to exclude felony DWI convictions from the legislature's definition of "prior felony conviction" for purposes of the State's habitual offender sentencing enhancement statute. See N.M.S.A. § 31-18-17 (1978) (as amended by Pub. L. 2003, Ch. 90, § 1).

Moreover, the present state of federal law also precludes any claim of reasonable notice to offenders with prior convictions for DWI. In *Leocal* v. *Ashcroft*, this Court recognized that "[t]he ordinary meaning of" the term "crime of violence" in 18 U.S.C. § 16 "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses." 543 U.S. 1, 11 (2004). This Court explained that "[i]nterpreting § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes" and thus the term "crime of violence" "cannot be read to include petitioner's conviction for DUI causing serious bodily injury." *Id.*

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[6] Petitioner was not the defendant in that case.

If this Court adopts the "all crimes" interpretation, it will only sow further confusion going forward as to what constitutes a "crime of violence" or "violent felony" in multiple federal statutes. Whatever fine distinctions there might be between differing interpretations of "crime of violence" under 18 U.S.C. § 16 and of "violent felony" under the ACCA's "otherwise" clause with respect to DUI and DWI offenses, ordinary persons cannot be expected to draw them. Accordingly, offenders with prior convictions for felony DWI could not have been on notice that their prior convictions were ACCA predicates, because both federal and state law strongly indicated to the contrary. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

The "all crimes" interpretation also invokes the second principal element of the vagueness doctrine—arbitrary enforcement. As discussed *supra*, at 6-7, the "all crimes" interpretation requires judges to speculate about the degree of risk posed by entire categories of offenses in making law under the ACCA, a process that calls upon judges to rely upon their own predilections in evaluating such risk. "Statutory language of . . . standardless sweep allows [judges] to pursue their personal predilections" and that "is precisely what offends the Due Process Clause." *Smith*, 415 U.S. at 574-75, 578. In the absence of any conceivable notice to offenders that their felony DWI convictions might count as ACCA predicates, and because the Tenth Circuit's interpretation of the statute throws open the door to arbitrary assessment, the Tenth Circuit's interpretation is void for vagueness.

C. The Fifth And Sixth Amendments.

The "all crimes" interpretation of the "otherwise" clause necessarily requires a court to conduct some form of factual investigation of the degree of risk of physical injury presented by the type of offense at issue. And because such a finding increases the permissible penalty from a range of zero to ten years to a range of fifteen years to life in prison, see 18 U.S.C. §§ 924(a)(2), (e)(1), the full panoply of Fifth and Sixth Amendment rights must apply. See *Apprendi*, 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Jones*, 526 U.S. at 243 n.6 (recognizing the principle that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").[7]

Apprendi and its progeny also recognize that the mere fact of a prior conviction, although it may increase the penalty for a crime "beyond the prescribed statutory maximum," need not be charged in an indictment, "submitted to a jury, [or] proved beyond a reasonable doubt." 530 U.S. at 490. This is

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[7] Even when courts find facts to determine a sentence within a range set by Congress, the basic due process requirements of notice, a meaningful opportunity to be heard, reliable information, and a burden of proof borne by the government apply. See *Rita* v. *United States*, 127 S. Ct. 2456, 2465 (2007); *Burns* v. *United States*, 501 U.S. 129, 137-38 (1991); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Townsend* v. *Burke*, 334 U.S. 736, 740-41 (1948).

because the certainty that the defendant received those constitutional protections in the proceeding resulting in the conviction ameliorates the concern that taking judicial notice of the fact of conviction, by itself, violates the defendant's constitutional rights in the later proceeding. *Id.* at 487-88; see also *Jones*, 526 U.S. at 249 ("[A] prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees.").

Here, however, the court of appeals went beyond taking mere judicial notice of the fact of prior felony DWI convictions and *independently* found that the conduct involved in those offenses "presents a serious potential risk of physical injury to another," a fact that is *neither* in the statutory definition of the elements of the offense, *nor* in the case law interpreting felony DWI in New Mexico.[8] In other words, Petitioner has not admitted in a guilty plea, nor has a jury found beyond a reasonable doubt, that Petitioner's felony DWI offenses involved conduct presenting "a serious potential risk of physical injury to another."

Nonetheless, the court of appeals determined, without considering any evidence (because the prosecution presented none to the district court), that "DWI certainly presents such a risk. Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers." JA 92.

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[8] Indeed, New Mexico's drunk driving statute recognizes a *separate* crime of "aggravated driving while under the influence" for which, *inter alia*, actually causing physical harm *is* an element. N.M.S.A. § 66-8-102 (1978) (as amended by Pub. L. 2007, Chs. 321-22). However, even this crime is not a felony until the fourth instance. *Id.*

As such, the court conducted judicial fact-finding that went far beyond the fact of conviction and the elements of New Mexico DWI as adjudicated against Petitioner in his prior convictions. As Justice Thomas has observed, allowing a judge to resolve contested questions as to whether a particular prior conviction was, in fact, a "violent felony" does more than merely raise constitutional questions—the exercise of such power violates a defendant's rights to notice, trial by jury, and proof beyond a reasonable doubt. *Shepard*, 544 U.S. at 28 (Thomas, J., concurring); see also *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting).[9]

It is no answer to say that the Tenth Circuit did not conduct judicial fact-finding because it relied upon *no evidence* and was merely "engaging in statutory interpretation." *James*, 127 S. Ct. at 1600.[10] "The

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[9] Moreover, as noted in Justice Thomas's separate concurrence in *Apprendi*, even fact-finding limited to the mere fact of the prior conviction may raise the same grave constitutional questions as fact-finding in relation to other enhancements. 530 U.S. at 519-21 (Thomas, J., concurring).

[10] In this case, as is commonly the case, the district court received no evidence regarding the risk of physical injury to another as a result of DWI, but instead relied upon opinions from various courts of appeals holding that the distinctly different definition of "crime of violence" in the career offender guideline, U.S.S.G. § 4B1.2, included DWI. However, the Sentencing Commission has made clear that "the definition[ ] of 'violent felony' . . . in 18 U.S.C. § 924(e)(2) [is] not identical to the definition[ ] of 'crime of violence' . . . used in § 4B1.1 (Career Offender)." U.S.S.G. § 4B1.4, comment (n.1). Indeed, the Commission's definition of "crime of violence" in the career offender guideline is similar to the "all crimes" interpretation because it, too, delinks the "otherwise" clause from the enumerated offenses that precede it. *See* U.S.S.G. § 4B1.2, comment (n.1).

court's characterization of its findings . . . as derived from 'common experience' does not make them any less 'facts.'" *United States* v. *Washington*, 404 F.3d 834, 842 n.9 (4th Cir. 2005). Judicial *speculation* about *factual* risk regarding a particular crime, or an entire category of crimes, is particularly pernicious, as it only exacerbates the constitutional difficulties posed by the Tenth Circuit's interpretation. See *United States* v. *Chambers*, 473 F.3d 724, 726 (7th Cir. 2007) ("[I]t is an embarrassment to the law when judges base decisions of consequences on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.").

Traditionally, risk is a factual question for the jury.[11] That is not surprising, as it is the province of

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[11] *See, e.g.*, *Byrd* v. *Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 539 n.13 (1958) ("The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury.") (internal citation omitted); *Dunbar* v. *Jackson Hole Mountain Resort Corp.*, 392 F.3d 1145, 1149 (10th Cir. 2004) (stating that "whether something is or is not an inherent risk is a factual question that must be sent to the jury for determination") (internal citation omitted); *Flores* v. *City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) (whether particular use of force is "deadly force," *i.e.*, "carrying with it a substantial risk of causing death or serious bodily harm," "is a question of fact, not one of law") (internal citation omitted); *Sapone* v. *Grand Targhee, Inc.*, 308 F.3d 1096, 1102 (10th Cir. 2002) ("Where genuine issues of material fact exist, the determination of whether something is or is not an inherent risk is a factual question that must be sent to the jury for determination."); *Dilluorth* v. *Gambardella*, 970 F.2d 1113, 1119 (2d Cir. 1992) (recognizing that "what risks in a sport are inherent, obvious, or necessary to its participation [are] question[s] that ordinarily must be resolved by the jury"); *O'Dell* v. *Hercules, Inc.*, 904 F.2d

the jury to decide issues of fact, as well as mixed issues of law and fact. See *United States* v. *Gaudin*, 515 U.S. 506, 513-15 (1995). Indeed, the reckless endangerment crimes cited in *James*, 127 S. Ct. at 1599 n.6, are precisely the types of risk assessments that juries perform, treating the dangerous conduct as a legislated element of the crime that must be proved beyond a reasonable doubt by evidence.

In *James*, the Court asserted that there was no Sixth Amendment violation because "the Court [was] engaging in statutory interpretation, not judicial fact finding." *Id.* at 1600. But the *James* opinion is *sui generis* because it involved the Florida offense of attempted burglary, a crime for which there was an appropriate analog in the enumerated offenses. Because Florida attempted burglary requires an overt act toward entry into a premises, it was so analogous to burglary that this Court was arguably able to "apply[ ] *Taylor*'s categorical approach," *id.*, and not run afoul of the defendant's constitutional rights.

1194, 1201 (8th Cir. 1990) ("risk of harm associated with exposure to dioxin," compared to risk associated with "use of controlled substances, was question of fact integral to a determination of risk of harm"); *Waffen* v. *U.S. Dep't of Health & Human Services*, 799 F.2d 911, 922 (4th Cir. 1986) (in medical malpractice case, whether increased risk of harm posed by defendant's conduct amounted to loss of substantial possibility of survival is question for the fact finder), *abrogated on other grounds by Hurley* v. *United States*, 923 F.2d 1091 (4th Cir. 1991); *Lust* v. *Clark Equip. Co.*, 792 F.2d 436, 440 (4th Cir. 1986) ("Whether [the defendant] fully appreciated the nature and extent of the risk presented a factual question for the jury—not the court"); *Mason* v. *Hunter*, 534 F.2d 822, 824 (8th Cir. 1976) ("The question of the assumption of risk is generally one of fact for the jury.").

In *Taylor*, this Court held that the only plausible interpretation of § 924(e)(2)(B) is that it requires the sentencing court "to look only to the fact of conviction and the *statutory definition* of the prior offense." 495 U.S. at 602 (emphasis added); see also *Shepard*, 544 U.S. at 17. Thus, courts may do no more than compare the statutory elements of the offense of conviction or the adjudicated elements of the offense of conviction to the elements of the sentence-enhancing clause and then conclude whether they "substantially correspond." *Taylor*, 495 U.S. at 602. The *Taylor* Court required courts to *compare elements* because (anticipating *Apprendi*) it recognized the constitutional implications for a defendant's right to a jury trial if § 924(e)(2)(B) were to be interpreted to permit a "factual approach." *Id.* at 601.

Courts cannot successfully employ the *Taylor* elements test to the panoply of unenumerated crimes that do not have an analog to one of the enumerated crimes in § 924(e)(2)(B), and which do not contain as an explicit element conduct that "presents a serious potential risk of physical injury to another."[12] That is because for those crimes courts must look *beyond* the crime's statutory definition (or adjudicated/plea elements) to consider the generic nature, possible consequences, and likely circumstances of the crime in determining whether it presents a serious potential risk of injury to others. By improperly employing the *Taylor* elements test and engaging in judicial fact-finding beyond merely taking judicial notice of prior convictions, the "all crimes"

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[12] Indeed, this Court in *James* cited several statutes that rely on language similar to that in the "otherwise" clause. 127 S. Ct. at 1598 n.6. Importantly, in *each* statute cited, the language constitutes an *element* of the crime and is therefore protected by all of the guarantees of the Fifth and Sixth Amendments.

interpretation implicates grave Fifth and Sixth Amendment concerns.

This Court acknowledged in *James* that it was not providing guidance about how to determine whether a crime that is not analogous to an enumerated crime in the ACCA is a violent felony. See *James*, 127 S. Ct. at 1598 ("provid[ing] guidance for the lower courts in future cases [is] surely a worthy objective," but *James* itself is not a proper case to do so because the case does not present such a crime). Such guidance, however, is found in *Taylor* and *Shepard*, as well as in *Haley*, where the Court explicitly recognized that the parameters of the "prior conviction" exception raise "difficult constitutional questions . . . to be avoided if possible." *Dretke* v. *Haley*, 541 U.S. 386, 395-96 (2004).[13] This Court should employ the doctrine of constitutional avoidance and adopt one of the interpretations discussed *infra*, at 25-30, which do not create such questions.

D. Separation of Powers.

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I, sec. 1. Defining crimes and assigning the range of permissible penalties is a legislative power vested exclusively in Congress; it may not be delegated to or

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[13] Following this Court's direction in these cases, several lower courts have recognized that the prior conviction exception must be narrowly construed. *See, e.g.*, *Washington*, 404 F.3d at 834 (holding that, in light of *Shepard*, the "prior conviction exception" is a limited one that does not permit judicial fact-finding regarding facts not contained in the indictment or the other documents *Shepard* permits); *United States* v. *Kortgaard*, No. 03-10421, 2005 WL 2292046 (9th Cir. Sept. 21, 2005) (recognizing that facts beyond the mere fact of conviction must be made by a jury or considered on an advisory basis).

assumed by the Judicial Branch. See *United States* v. *Evans*, 333 U.S. 483, 486 (1948) (observing that "as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions"); *Ex parte United States*, 242 U.S. 27, 41-42 (1916) (stating that "the authority to define and fix the punishment for crime is legislative," while the "right . . . to impose the punishment provided by law, is judicial"); *United States* v. *Wiltberger*, 18 U.S. (1 Wheat) 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment."); *United States* v. *Hudson*, 11 U.S. (1 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").

Under the ACCA, Congress has delegated to the courts the task of determining whether an offense that does not have force as an element; is not burglary, arson, or extortion; and does not involve the use of explosives, is nonetheless a "violent felony" because it "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). This determination increases the statutory penalty from a range of zero to ten years to a range of fifteen years to life in prison. See 18 U.S.C. §§ 924(a)(2), (e)(1). Because the "all crimes" interpretation of the "otherwise" clause provides no standards for this important determination, it assumes that Congress intended to delegate to the courts the legislative responsibility to define aggravated crimes with a distinct minimum and maximum penalty. It requires the courts to make "an essentially legislative judgment." *United States* v. *Thomas*, 159 F.3d 296, 300 (7th Cir. 1998). The courts must determine the "potential risk" of

physical injury presented by a category of offense—a factual question which in practice is answered by hypotheticals and speculation—and then make an assessment of whether that degree of risk is "serious" enough as a policy matter to warrant increasing the statutory minimum from zero to fifteen years and the statutory maximum from ten years to life.

This approach gives the courts unlimited "power to subject almost any repeat offender to ACCA's 15-year mandatory minimum." *James*, 127 S. Ct. at 1606 n.4 (Scalia, J., dissenting); see also *Golden*, 466 F.3d at 617 (Williams, J., dissenting) (observing that "if Congress intended for the courts to examine the risk of physical injury in the abstract, it could have simply instructed the courts that 'violent felonies' are all those involving 'conduct that presents a serious potential risk of injury to another'"). This "goes beyond dispelling ambiguity in the usual sense of judicially construing statutes and . . . require[s individual judges, the courts of appeals, and] this Court to invade the legislative function and in effect, fix the penalty." *Evans*, 333 U.S. at 486, 488-91 (declining to read into a criminal statute a penalty that clearly applied to only one form of the offense as applying to other conduct that may or may not have been prohibited by the statute).

When a court decides that a category of offense "presents a serious potential risk of injury to another," not through statutory construction, but as a matter of fact, policy, conjecture, or personal predilection, it raises the permissible sentencing range of zero to ten years, to fifteen years to life. Well beyond "impos[ing] sentences within the broad limits established by Congress," the effect is to "bind and regulate the primary conduct of the public [and to] vest in the Judicial Branch the legislative

responsibility for establishing minimum and maximum penalties." *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989).[14]

The power to define what conduct sets the minimum and maximum permissible range, not through statutory construction but through fact-finding, policymaking, conjecture, or personal predilection, is in no way "ancillary to" the proper judicial function of sentencing within a range established by Congress. While "[t]rial judges could be given the power to determine what factors justify a greater or lesser sentence *within the statutorily prescribed limits* because that was ancillary to their exercise of the judicial power [to] pronounc[e] sentence upon individual defendants," *id.* at 417-18 (Scalia, J., dissenting) (emphasis added), judges have no power, implied or inherent, to disregard a sentence fixed by Congress, *Ex parte United States*, 242 U.S. at 41-42, or to sentence below or above the range set by Congress. Because the "all crimes" interpretation requires judges to exercise legislative

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[14] In holding that the Sentencing Commission's activities did not violate the separation of powers, the Court repeatedly noted that the Commission's authority to make substantive and political judgments in promulgating guidelines does not have the effect of altering the minimum or maximum permissible punishment. See *Mistretta*, 488 U.S. at 375 (guideline "sentencing ranges must be consistent with pertinent provisions of Title 18 . . . and could not include sentences in excess of the statutory maxima"); *id.* at 378 n.11 (The "Commission could include the death penalty within the guidelines only if that punishment was authorized . . . by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments."); *id.* at 391 (analogizing Commission's role to "the consistent responsibility of federal judges to pronounce sentence within the statutory range established by Congress").

power that is not ancillary to any valid judicial power, it reflects a "pure delegation of legislative power" that is wholly invalid under the separation-of-powers doctrine. *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting).

Moreover, when courts must perform the legislative function of determining which categories of prior offenses constitute "violent felonies" subject to a distinct minimum and maximum penalty simultaneously with exercising the judicial function of imposing sentence, the "all crimes" interpretation unites legislative and judicial powers in the court in a way that violates the separation of powers. By contrast, the Sentencing Commission's "political or quasi-legislative . . . powers are not united with the powers of the Judiciary in a way that has meaning for separation-of-powers analysis" because the Commission "is not a court and exercises no judicial power." *Id.* at 393, 408; see also *United States* v. *Booker*, 543 U.S. 220, 242-43 (2005). But when judges apply the "all crimes" interpretation of the "otherwise" clause, they are indisputably "wear[ing] both hats at the same time," which the Constitution forbids as a *per se* matter. *Mistretta*, 488 U.S. at 404.

Finally, even assuming that Congress could delegate to the courts the power to define which crimes invoke the ACCA's minimum and maximum permissible sentencing range, doing so under the "all crimes" interpretation would be an "excessive delegation" due to the absence of an "intelligible principle to which [the court] is directed to conform." *Id.* at 372. In sharp contrast to Congress's detailed directives to the Sentencing Commission, *id.* at 374-78, the "all crimes" interpretation looks only to the bare phrase, "otherwise involves conduct that

presents a serious potential risk of physical injury to another," without reference to any other part of the statutory provision or its legislative history.

That this is not an intelligible standard is patent in the court of appeals' finding in this case: "Many would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers." JA 92. Other courts have openly acknowledged that "such a nebulous standard cries out for speculation regarding facts extraneous to the prior conviction." *United States* v. *Thompson*, 421 F.3d 278, 286 (4th Cir. 2005); see also *Chambers*, 473 F.3d at 726-27 (noting that "it is an embarrassment to the law when judges base decisions of consequence on conjectures . . . floating well free of any facts," and suggesting that "Congress, which has investigative tools, might examine the issue"); *Golden*, 466 F.3d at 615 (Rovner, J., concurring) ("we do not know the actual risks to law enforcement officers in recaptures following escapes . . . versus captures following failure to report to jail," and we "have no way of knowing"). Because courts lack the constitutional authority to make the quintessential legislative judgment of which crimes are risky enough to warrant ACCA enhancement, the Tenth Circuit's interpretation runs afoul of separation of powers.

This Court has been vigilant against the danger "that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,'" *Mistretta*, 488 U.S. at 383 (quoting *Morrison* v. *Olsen*, 487 U.S. 654, 680-81 (1988)), and has invalidated attempts by Congress to reassign powers vested by the Constitution in one Branch to another, *id.* at 382. To guard against that danger in this case, the "all crimes" interpretation of the ACCA's "otherwise" clause must be rejected.

II. THE "OTHERWISE" CLAUSE SHOULD BE INTERPRETED IN A WAY THAT CREATES A STANDARD FOR JUDGES AND AVOIDS SERIOUS CONSTITUTIONAL QUESTIONS.

The constitutional questions raised by the Tenth Circuit's standardless interpretation of the "otherwise" clause in § 924(e) are significant but avoidable. These "grave and doubtful" questions, *Jones*, 526 U.S. at 239, discussed *supra*, can be avoided by adopting either: (1) Petitioner's interpretation, which would limit the applicability of the "otherwise" clause to crimes similar to those listed in the statute in ways made relevant in light of principles of statutory construction, or (2) an interpretation under which the "otherwise" clause would require that predicate offenses have as an explicit element conduct presenting a "serious potential risk of physical injury to another."

Each of these interpretations would avoid the unconstitutional vagueness of the "all crimes" approach by providing a principled way to clearly delineate crimes punishable under the ACCA. Additionally, either approach would resolve the constitutional concerns regarding the Fifth and Sixth Amendments as well as separation of powers by allowing judges to return to their role as interpreters of statutes instead of requiring them both to find facts beyond the mere fact of conviction and to legislate.

A. "Similar Crimes" Interpretation.

Petitioner's suggested "similar crimes" interpretation of the "otherwise" clause avoids the constitutional issues raised by the "all crimes" interpretation. Pet. Br. at 44-45. The "similar crimes" interpretation—requiring that a crime be

similar to those listed in that they are violent, active crimes against property that are typically committed by career offenders as a means of livelihood and that are made more dangerous when committed with a firearm—is not unconstitutionally vague, and it prevents the courts from violating the Fifth and Sixth Amendments by finding facts or from violating separation of powers by legislating.

This Court noted in *James* that "[t]he specific offenses enumerated in [§ 924(e)(2)(B)] (ii) provide one baseline from which to measure whether other similar conduct 'otherwise . . . presents a serious potential risk of physical injury.'" 127 S. Ct. at 1594. Judges using the enumerated offenses as a baseline can reasonably be expected to determine whether similar crimes are predicate offenses under the ACCA, and defendants with prior convictions for "similar crimes" reasonably can be said to be on notice that their prior convictions are predicates. See, *e.g.*, *id.* ("[W]e can ask whether the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses—here, completed burglary."). Interpreting the "otherwise" clause to require that predicate crimes be similar to those enumerated in the statute in relevant respects would provide the clarity the Constitution requires of penal statutes.

Petitioner's "similar crimes" interpretation likewise avoids the "grave and doubtful" Fifth and Sixth Amendment issues, *Jones*, 526 U.S. at 239, raised by the "all crimes" interpretation. The "similar crimes" interpretation would require courts to engage only in traditional statutory interpretation by determining whether or not the prior offense is similar to the enumerated offenses in ways made relevant by well-established tools of statutory construction—and not

speculative fact-finding based upon perceived levels of risk. This is precisely what *Taylor*'s categorical approach requires courts to do. 495 U.S. at 602. See *supra*, at 18-19.

The "similar crimes" interpretation also does not raise constitutional concerns over the separation-of-powers doctrine. Under this approach, courts need only interpret the "otherwise" clause in light of principles of statutory construction to clarify which crimes are similar to those listed—an exercise akin to the Court's test in *Taylor*. 495 U.S. at 602.

Finally, the ACCA's legislative history supports the "similar crimes" interpretation, further suggesting this interpretation is constitutionally unproblematic. See Pet. Br. at 25-28; *Taylor*, 495 U.S. at 584-87 (§ 924(e)(2)(B)(ii) was enacted to "add State and Federal crimes against property such as burglary, arson, extortion, use of explosives and *similar* crimes as predicate offenses") (quoting H.R. Rep. No. 99-849, at 3 (1986)) (emphasis added). It is apparent Congress did not believe it was constitutionally problematic to ask the courts to determine which crimes should be considered "similar" to those listed.

B. An Elements-Based Approach.

An elements-based interpretation of the "otherwise" clause is consonant with the Court's "categorical" approach in *Taylor* and *Shepard*. This interpretation would require that predicate crimes included under the "otherwise" clause have as an explicit element conduct that "presents a serious potential risk of physical injury to another." Like the interpretation proposed by Petitioner, this interpretation is not impermissibly vague and does not require judges to increase the minimum and maximum sentences based on facts that were never charged, proved to a

jury, or found beyond a reasonable doubt, or to legislate in violation of separation of powers. Nor does this interpretation render superfluous § 924(e)'s "use of physical force" element provision, because the "otherwise" clause would apply to a number of crimes involving reckless behavior that would not be punishable under the ACCA's force-as-an-element clause.

The first strength of an elements-based reading of the "otherwise" clause is its clarity. It would be abundantly clear to individuals whether they are eligible for punishment under the ACCA. If a prior conviction has as an element a "serious potential risk of physical injury to another," individuals can be sure it is a predicate crime under the "otherwise" clause; without this element, they can be equally sure it is not.

Additionally, an elements-based reading would address concerns regarding the Fifth and Sixth Amendments because judges would determine the applicability of the "otherwise" clause based only on *elements* of a prior conviction, instead of engaging in any impermissible judicial fact-finding. *Taylor*, 495 U.S. at 600-02; *Shepard*, 544 U.S. at 24-26 (plurality opinion). See *supra*, at 18-19.

Adopting the elements-based interpretation would simply mean this Court's reaffirming *Taylor*'s categorical approach by maintaining the requirement that the elements of the prior conviction "substantially correspond" to the elements of the sentence-enhancing clause, specifically, conduct that presents a "serious potential risk of physical injury to another." Because this interpretation asks courts only to look to the elements of prior convictions, which are established by the legislature and previously charged and tried before a jury or

admitted by the defendant, no Fifth or Sixth Amendment issues are implicated. See *Apprendi*, 530 U.S. at 490.

Finally, this interpretation definitively resolves any concerns that judges are legislating, because they would have no discretion as to which crimes are predicate offenses under the "otherwise" clause. Cf. *Evans*, 333 U.S. at 486. Instead, the legislatively established elements of a prior conviction would drive the determination as to whether the "otherwise" clause applies.

This interpretation would not render superfluous the "use of force" provision of the ACCA, because the "otherwise" clause would apply to a significant number of reckless endangerment crimes. The ACCA includes as a category of predicate crimes those that have as an element "the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). In *Leocal* this Court determined that, in an identical clause, the word "use" limited its application, because it "suggests a higher degree of intent than negligent or merely accidental conduct." 543 U.S. at 9.

An elements-based reading of the "otherwise" clause would apply it to crimes in which the offender could not be said to have "used" force against another person, but nonetheless created a serious potential risk of physical injury to another. These are, in large part, reckless endangerment crimes under both federal and state law. *E.g.*, 18 U.S.C. § 2332b(a)(1)(B) (defining "terrorist act" as conduct that, *inter alia*, creates "a substantial risk of serious bodily injury to any other person"); Ala. Code § 13A-6-24(a) (reckless endangerment requires finding of "conduct which creates a substantial risk of serious physical injury to another person."); Alaska Stat.

§ 11.41.250(a) (same); N.Y. Penal Law § 120.20 (same).[15] Additionally, this element is found in a significant number of crimes, several of which the Court cited in *James*. 127 S. Ct. at 1598 n.6. The elements-based interpretation would thus give effect to all of the provisions of § 924(e).

Thus, this Court can, and should, avoid the constitutional questions raised by the Tenth Circuit's interpretation of the "otherwise" clause in § 924(e) by adopting either: (1) Petitioner's interpretation, which would limit the applicability of the "otherwise" clause to crimes similar to those listed in the statute in ways made relevant in light of principles of statutory construction, or (2) an interpretation under which the "otherwise" clause would require that predicate offenses have as an explicit element conduct presenting a "serious potential risk of physical injury to another."

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals.

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[15] *See also* Ariz. Rev. Stat. § 13-2508 (defining "resisting arrest" as, *inter alia*, preventing an officer from effecting an arrest through "any . . . means creating a substantial risk of causing physical injury to the peace officer or another"); Cal. Health & Safety Code § 42400.3.(b) (criminalizing air pollution "that results in any unreasonable risk of great bodily injury to, or death of, any person"); Fla. Stat. § 1006.135(3) (defining hazing to require proof of "a substantial risk of physical injury or death to such other person"); N.Y. Penal Law § 145.45 (tampering with a consumer product in the first degree requires proof of "a substantial risk of serious physical injury to one or more persons"); *id.* § 490.47 ("criminal use of a chemical weapon or biological weapon" requires proof of "a grave risk of death or serious physical injury to another person not a participant in the crime").

Respectfully submitted,

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